

IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
KOOTENAI RIVER BASIN (76D)
PRELIMINARY DECREE

* * * * *

CLAIMANTS: Robert J. & Jackie L. LeBlanc Family Trust;
James E. Smith

OBJECTOR: United States of America (USDA Forest Service)

CASE 76D-0104-R-2022
76D 140156-00
76D 140158-00
76D 140159-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

Water Right Claims 76D 140156-00, 76D 140158-00, and 76D 140159-00
appeared in the Preliminary Decree for the Kootenai River Basin (Basin 76D) issued May

6, 2021. This claim received an issue remark. Issue remarks result from Department of Natural Resources and Conservation (“DNRC”) claims examination or by Water Court order. Claims examination confirms the historical use of water right claims and identifies issues with claims. If claims examination cannot confirm some aspect of a claim, an issue remark is added to the claim. These claims also received objections filed by the United States of America (USDA Forest Service).

The Court consolidated these claims into Water Court Case 76D-0104-R-2023 on December 23, 2022. The consolidation order set a settlement deadline. On May 3, 2023, Claimants filed an unopposed motion to implement certain amendments to resolve the issues in this case.

FINDINGS OF FACT

1. Claims 76D 140156-00 and 76D 140158-00 appeared with the following issue remarks:

THE CAPACITY OF THE DIVERSION AND CONVEYANCE SYSTEM CANNOT BE DETERMINED AND THE FLOW RATE REMAINS AS ORIGINALLY CLAIMED. THE CLAIMED FLOW RATE CAN BE CONTESTED BY PROPER OBJECTION. IF NO OBJECTIONS ARE FILED TO THIS CLAIM THE FLOW RATE WILL BE DECREED AS CLAIMED, AND THIS REMARK WILL BE REMOVED FROM THE CLAIM.

THE CLAIMANT DID NOT IDENTIFY THE PERIOD OF DIVERSION FOR THIS RIGHT. A PERIOD OF DIVERSION HAS BEEN ADDED TO MATCH THE PERIOD OF USE. IF NO OBJECTIONS ARE RECEIVED TO THE PERIOD OF DIVERSION OR PERIOD OF USE, THOSE ELEMENTS WILL BE DECREED AS SHOWN ON THIS ABSTRACT AND THIS ISSUE REMARK WILL BE REMOVED FROM THIS CLAIM.

CLAIMED VOLUME EXCEEDS CAPACITY OF RESERVOIR PLUS EVAPORATIVE LOSSES. THE CLAIMED VOLUME CAN BE CONTESTED BY PROPER OBJECTION. IF NO OBJECTIONS ARE FILED TO THIS CLAIM THE VOLUME WILL BE DECREED AS CLAIMED, AND THIS REMARK WILL BE REMOVED FROM THE CLAIM.

DITCH NAME WAS MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE

ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

AN AMENDMENT WAS SUBMITTED ON 02/10/2020 REQUESTING TO AMEND THE FLOW RATE AND VOLUME. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

2. Claim 76D 140159-00 appeared with the following issue remark:

POINT OF DIVERSION, MEANS OF DIVERSION AND DITCH NAME WERE MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

AN AMENDMENT WAS SUBMITTED ON 02/10/2020 REQUESTING TO AMEND THE PLACE OF USE AND PERIOD OF DIVERSION. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

3. The United States objected to the flow rate and volume of each above-captioned claim.

4. Claimants' May 3, 2023 filing includes a brief and supporting evidence. Through the 2020 amendments and their filing in this case, Claimants request the following modifications:

Claim 76D 140156-00

(a) Flow Rate: ~~125.00 cfs~~ **4.00 cfs**

(b) Volume: ~~90,500 AC-FT~~ **264.04 AC-FT**

These are reductions to the flow rate and volume and do not require supporting evidence. However, Claimants support the request with a 2019 letter from the Montana Department of Fish, Wildlife & Parks (FWP).

Claim 76D 140158-00

(a) Flow Rate: ~~2.50 cfs~~ **4.00 cfs**

(b) Volume: ~~1,810 AC-FT~~ **185.95 AF**

(c) Capacity: ~~114.00 ACRE-FEET~~ **142.08 AC-FT**

Claimants support the requested flow rate increase with a letter from FWP. In the letter, Fisheries Biologist James Dunnigan states that FWP staff obtained flow rate measurements consistent with 4.0 CFS. Claimant's volume and capacity figures are derived using methodology appearing on DNRC's reservoir questionnaire.

Claim 76D 140159-00

Claimants request the flow rate be increased to 4.00 CFS, the period of diversion be May 1 to October 1, the place of use encompass 395.00 acres.

Claimants support the increased flow rate with a letter from FWP, the 1922 Notice of Appropriation for 4.00 CFS, and field notes from the 1964 Water Resource Survey of Lincoln County.

Claimant supports the requested period of diversion and period of use with a Declaration of Robert LeBlanc. Mr. Leblanc states he was raised on the subject property since 1960 and became the fulltime caretaker in 1980. Mr. Leblanc states the historical practice of irrigation has been to begin irrigating as early as May 1 and as late as October 1.

Claimants also support the requested place of use with Mr. Leblanc's Declaration. An annotated map is attached to the Declaration depicting historically irrigated acres. According to the Declaration, map, and filing, Claimants believe the place of use should be as follows:

ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
	146.00		S2NW	18	35N	25W	Lincoln
			SW	18	35N	25W	Lincoln
			W2SE	18	35N	25W	Lincoln
	177.00		NW	19	35N	25W	Lincoln
			W2NE	19	35N	25W	Lincoln
			E2SW	19	35N	25W	Lincoln
	55.00		W2SW	19	35N	25W	Lincoln
	6.00		SESW	19	35N	25W	Lincoln
	5.00		NENWSW	20	35N	25W	Lincoln
	6.00		NENW	30	35N	25W	Lincoln
	395.00						

5. Claimants indicate that counsel for Objector reviewed the requests and supporting brief and does not oppose Claimants' requests. Claimants state if the Court implements the requested modifications the objections will be resolved.

6. Each above-captioned claim should be modified as requested. However, regarding Claim 76D 140159-00, Claimants did not provide specific irrigation figures for each legal land description associated with 146.00 acres of irrigation in Section 18 and 177.00 acres of irrigation in Section 19. An information remark should be added clarifying that irrigation occurs in certain areas within each section.

7. The following information remark should be added to Claim 76D 140159-00:

THE FOLLOWING CLARIFIES IRRIGATION IN SECTIONS 18 AND 19 OF TOWNSHIP 35 NORTH, RANGE 25 WEST: IN ADDITION TO ACREAGE DESCRIBED IN PLACES OF USE 3 AND 4, IRRIGATION OCCURS IN THE S2NW, SW, AND W2SE OF SECTION 18, T35N, R25W, LINCOLN COUNTY AND IN THE NW, S2NE, AND E2SW OF SECTION 19, T35N, R25W, LINCOLN COUNTY.

8. The issue remarks should be removed from the above-captioned claims.

APPLICABLE LAW

1. A properly filed statement of claim is prima facie proof of its content. Section 85-2-227, MCA. The prima facie status of a claim may be overcome by a preponderance of the evidence. Section 85-2-227, MCA; Rule 19, W.R.Adj.R. A preponderance of the evidence is evidence that shows a fact is "more probable than not." *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

2. The Water Court must weigh an issue remark, and the information resulting in that issue remark, against the claimed water right. Section 85-2-247(2), MCA.

3. The Water Court must resolve all issue remarks not resolved through the objection process. Section 85-2-248, MCA. The Court must review information in the claim file or obtained by the Court to determine if there is a sufficient basis to resolve the remarks. 85-2-248(3), MCA.

4. The Water Court has the authority to hear all objections to the elements of any claim included in a Court issued Temporary Preliminary Decree or Preliminary Decree. Section 85-2-233, MCA.

CONCLUSIONS OF LAW

1. The changes described in the Findings of Fact may be made because the evidence in the record overcomes the prima facie status of each relevant claim by a preponderance of the evidence. In some instances, evidence was provided but not required because the requested modification results in a decrease in an element.

2. The evidence in the record and the proposed changes provide the Court with a sufficient basis to resolve and remove each issue remark from each above-captioned claim.

3. The changes described in the Findings of Fact resolve the Objections filed against each above-captioned claim.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. Post-decree Abstracts of Water Right Claims are served with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service Via Electronic Mail:

Abigail R. Brown
Ross P. Keogh
Parsons Behle & Latimer
127 East Main Street, Suite 301
Missoula, MT 59802
Main: 406-317-7220
Direct: 406-317-7243
AbbyBrown@parsonsbehle.com
rkeogh@parsonsbehle.com
ecf@parsonsbehle.com

Mark J. Widerschein, Trial Attorney
US Dept of Justice, ENRD-NRS
PO Box 7611
Washington, DC 20044-7611
(202) 532-5803
mark.widerschein@usdoj.gov
MontanaBasins.ENRD@USDOJ.GOV

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
KOOTENAI RIVER
BASIN 76D**

Water Right Number: 76D 140156-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: LEBLANC, ROBERT J & JACKIE L FAMILY TRUST
PO BOX 426
FORTINE, MT 59918 0426

SMITH, JAMES E FAMILY TRUST
PO BOX 255
FORTINE, MT 59918 0255

Priority Date: AUGUST 29, 1924

Type of Historical Right: FILED

Purpose (use): FISH AND WILDLIFE

Flow Rate: 4.00 CFS

Volume: 264.04 AC-FT

THE USE OF THIS WATER APPEARS TO BE LARGELY NONCONSUMPTIVE.

Source Name: DEEP CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NENENW	29	35N	25W	LINCOLN

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: HEADGATE

Ditch Name: KLINKE-ZELLER DITCH

2		SWSENE	20	35N	25W	LINCOLN
---	--	--------	----	-----	-----	---------

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: HEADGATE

Ditch Name: PIEPENBRINK DITCH

Reservoir: OFFSTREAM **Reservoir Name:** CRYSTAL LAKE

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NWSENE	19	35N	25W	LINCOLN

Diversion to Reservoir: DIVERSION # 1

Depth: 17.00 FEET

Surface Area: 22.98 ACRES

Capacity: 195.33 ACRE-Feet

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SEnw	19	35N	25W	LINCOLN
2			SWNWNE	19	35N	25W	LINCOLN

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
KOOTENAI RIVER
BASIN 76D**

Water Right Number: 76D 140158-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: SMITH, JAMES E FAMILY TRUST
PO BOX 255
FORTINE, MT 59918 0255

Priority Date: MARCH 13, 1922

Type of Historical Right: FILED

Purpose (use): FISH AND WILDLIFE

Flow Rate: 4.00 CFS

Volume: 185.95 AC-FT

THE USE OF THIS WATER APPEARS TO BE LARGELY NONCONSUMPTIVE.

Source Name: DEEP CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWSENE	20	35N	25W	LINCOLN

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: HEADGATE

Ditch Name: PIEPENBRINK DITCH

Reservoir: OFFSTREAM **Reservoir Name:** OLGA LAKE

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	W2W2	20	35N	25W	LINCOLN

Diversion to Reservoir: DIVERSION # 1

Depth: 19.90 FEET

Surface Area: 14.37 ACRES

Capacity: 142.08 ACRE-FEET

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NWSW	20	35N	25W	LINCOLN
2			SWSWNW	20	35N	25W	LINCOLN

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

140158-00

140159-00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
KOOTENAI RIVER
BASIN 76D**

Water Right Number: 76D 140159-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: LEBLANC, ROBERT J & JACKIE L FAMILY TRUST
PO BOX 426
FORTINE, MT 59918 0426

SMITH, JAMES E FAMILY TRUST
PO BOX 255
FORTINE, MT 59918 0255

Priority Date: MARCH 13, 1922

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER

Flow Rate: 4.00 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 395.00

Source Name: DEEP CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWSNE	20	35N	25W	LINCOLN

Period of Diversion: MAY 1 TO OCTOBER 1

Diversion Means: HEADGATE

Ditch Name: PIEPENBRINK DITCH

Period of Use: MAY 1 TO OCTOBER 1

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	146.00			18	35N	25W	LINCOLN
2	177.00			19	35N	25W	LINCOLN
3	55.00		W2SW	19	35N	25W	LINCOLN
4	6.00		SESW	19	35N	25W	LINCOLN
5	5.00		NENWSW	20	35N	25W	LINCOLN
6	6.00		NENW	30	35N	25W	LINCOLN

Total: 395.00

THE FOLLOWING CLARIFIES IRRIGATION IN SECTIONS 18 AND 19 OF TOWNSHIP 35 NORTH, RANGE 25 WEST: IN ADDITION TO ACREAGE DESCRIBED IN PLACES OF USE 3 AND 4, IRRIGATION OCCURS IN THE S2NW, SW, AND W2SE OF SECTION 18, T35N, R25W, LINCOLN COUNTY AND IN THE NW, S2NE, AND E2SW OF SECTION 19, T35N, R25W, LINCOLN COUNTY.

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

140158-00

140159-00